IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 546.

WILLIAM R. RODMAN, UNITED STATES MARSHAL,
Petitioner,

vs.

ROLAND R. POTHIER, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AND TO PARTICIPATE IN THE ARGUMENT AS AMICI CURIAE.

JESSE C. ADKINS,
FRANK F. NESBIT,
Amici Curiae Attorneys,
for Adelbert Cronkhite.

February, 1924.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Now comes Adelbert Cronkhite and moves the Court for leave to file a brief herein in support of the position taken by William R. Rodman, United States Marshal, and for leave to have counsel filing said brief participate in the oral argument hereof.

The said Adelbert Cronkhite shows to the Court that on October 13, 1922, the grand jurors of the United States in and for the Southern Division of the Western

District of the State of Washington duly filed in the United States District Court for said district an indictment charging the respondent herein, Roland R. Pothier, with having murdered Alexander P. Cronkhite on October 25, 1918, within and on lands under the exclusive jurisdiction of the United States within said Southern Division of the Western District of Washington; that the said Adelbert Cronkhite is the father and nearest next of kin of the said Alexander P. Cronkhite, deceased.

JESSE C. ADKINS,
FRANK F. NESBIT,
Amici Curiae Attorneys,
for Adelbert Cronkhite.

February, 1924.

DAVIS S. ARNOLD, ESQ.,
Attorney for Roland R. Pothier.

Please take notice that the foregoing will be presented to the Supreme Court of the United States on Monday, the third day of March, 1924.

JESSE C. ADKINS,
FRANK F. NESBIT,
Amici Curiae Attorneys,
for Adelbert Cronkhite.

Service of copy of the foregoing motion and of brief to be filed as amici curiae acknowledged this —— day of February, 1924.

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OCTOBER TERM 1923.

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WILLIAM R. RODMAN, United States Marshal,
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BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONER.

JESSE C. ADKINS,
FRANK F. NESBIT,
Amici Curiae, Attorneys for General Adelbert Cronkhite.

February, 1924.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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WILLIAM R. RODMAN, United States Marshal,
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ROLAND R. POTHIER, *Respondent*.

BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONER.

The facts are contained in the brief for petitioner. A short statement here will suffice.

October 19, 1922, the United States Commissioner for Rhode Island, after due examination found that the offense of murder had been committed in the Western District of Washington as set out in the indictment, and that there was probable cause to believe that Pothier had committed that crime; he therefore commit-

ted Pothier to the custody of the Marshal to await removal (Rec. 4, Ex. A to petition).

December 6, 1922, Pothier filed in the District Court for Rhode Island his petition for the writs of habeas corpus and certiorari, attaching as Exhibit B copy of the indictment against him in the Washington district (5). Neither writ was issued. A citation only was issued to the Marshal to show cause on December 11th why the petitions should not be granted (10). There was no answer to this citation, but it and the Government's petition for warrant of removal were heard together. January 11, 1923, the District Judge filed an opinion, holding that it appeared that the indictment was by a court of competent jurisdiction; that there was probable cause for Pothier's commitment by the Commissioner, and that his detention was valid (37). January 30, an order was signed finding that the petition failed to state sufficient grounds for granting the writ of habeas corpus, and that the detention of accused was in accordance with law, and adjudging that the petition for writ of habeas corpus be dismissed and denied (40).

On the petition for removal, the Court filed an opinion holding that defendant had failed to overcome the prima facie case made out by the indictment; that the evidence failed to show want of probable cause and that the warrant of removal should issue (37).

Pothier appealed only from the order denying the petition for habeas corpus (40), and further proceedings on the warrant of removal were stayed (44).

At the argument in the Circuit Court of Appeals, it was stiplated that the appeal should be considered as one from an order of the district court denying a petition for writ of habeas corpus filed to test the legality

of restraint under the warrant of removal authorized by the opinion of that court (146).

The printed record contains what purports to be a transcript of the proceedings taken December 11, 1922. It appears to have been taken in the hearing on both petitions. It consists of the testimony of four witnesses and a number of exhibits. It was not preserved by bill of exceptions (13 to 37). The original exhibits were transmitted to this Court (44), and are printed in the record (47-144).

The opinion of the Court of Appeals contains a number of errors, due perhaps to the confused state of the record.

That opinion says that after the filing of the petition for writs of habeas corpus and certiorari, the citations issued by the District Judge required the Marshal to produce appellant before the court and the Commissioner to certify the proceedings and evidence before him (148). Apparently this is on the mistaken assumption that the writs of habeas corpus and certiorari were actually issued. In fact the Commissioner and the Marshal were notified of the filing of the petitions and that the hearing would be had, and they were cited to attend and show cause why the petitions should not be granted (10).

The Court of Appeals states that all the evidence presented at the hearing before the District Judge on the petition for removal is before the Court. That evidence is not preserved by bill of exceptions, though it is physically in the record. On the habeas corpus petition, the writ not having issued, there was merely a question of law whether a prima facie case was made out for the issuance of the writ on which question evidence would not be proper. The stipulation

amending in substance the petition for habeas corpus, does not attempt to incorporate therein the evidence on the application for removal.

Finally the Court reversed the order of removal (156), from which order no appeal had been taken.

ARGUMENT

UNDER THE PRINCIPLES ANNOUNCED BY THIS COURT, THE DISTRICT COURT PROPERLY DECLINED TO ISSUE A WRIT OF HABEAS CORPUS TO INQUIRE INTO THE VALIDITY OF POTHIER'S DETENTION UNDER THE WARRANT OF REMOVAL.

The United States has attempted by regular process to compel Pothier to answer an indictment for murder found against him in its District Court for the Western District of Washington. Pothier has attempted to frustrate that regular process.

After indictment, Pothier was arrested before the United States Commissioner in Rhode Island. At a formal hearing he had the opportunity to introduce evidence. He raised the legal question now involved. He was held for removal. The next regular hearing was held before the United States Judge on application for warrant of removal. Pothier gave evidence and again presented to that judge his objections to removal.

His evidence was held insufficient to overcome the probable cause made by the indictment.

The present proceeding by Pothier is to prevent the carrying out of the judge's order for his removal on the same grounds presented to and decided by the district judge, and necessarily to prevent the United

States from ever placing him upon trial on the present or any other similar indictment.

This effort is made notwithstanding the fact that Pothier's claim can again be presented to the trial court and presumably will be properly decided there.

Where an indicted person is arrested outside the Federal District where the indictment is returned, the procedure for his removal is not entirely satisfactory.

Such a proceeding is not a case of extradition. There is no surrender of the accused by the United States to a foreign nation, nor is there the qualified extradition which arises when one State within the Union surrenders to another an alleged fugitive from its justice. Beavers v. Henkel, 194 U. S. 82.

Such a proceeding is simply an effort "on the part of the United States to subject a citizen found within its territory to trial before one of its own courts." The locality in which the offense is charged to have been committed determines, under the Constitution and laws, the place and court of trial. The question is, what steps are necessary to bring the alleged offender to that place and before that court (Ib. 83).

In prosecutions for infamous offenses the Fifth Amendment requires indictment by a grand jury. But it does not require two indictments nor a preliminary hearing after indictment (Ib. 83-85).

It would not be an unreasonable exercise of power if the United States by statute should provide that after indictment in one of its courts, the accused might be arrested on the warrant of that court wherever found within our territorial limits. Indeed it has been held by Attorneys General under existing statutes that the arrest might thus be made. See Case of Oaksmith, 11 Op. Attys. Gen. 127.

However, this practice has not in fact been followed. In such cases, proceedings have been taken under Section 1014 R. S. U. S. If the hearing was held before indictment, it has been conducted in the way customary at common law, before a committing magistrate. If, as was frequently the case, an indictment had already been found, the United States produced before the Commissioner only a certified copy of the indictment. On the principle approved by this court in Beavers v. Henkel, 194 U. S. 73, it is held that this makes a prima facie case.

This practice had been established for more than one hundred years before any case was brought to this court.

In 1899 Greene and Gaynor, who had a contract to construct certain river and harbor improvements in the Savannah River, were indicted in the United States District Court for the Southern District of Georgia, together with a Captain Carter, for conspiring to defraud the United States in connection with that contract.

After indictment they were arrested in New York and began a determined fight to avoid removal. After the case in this court had gone against them, they fled to Canada and it was 1902 before they were removed to Georgia. United States v. Greene, 113 Fed. 683.

In the proceeding before the United States Commissioner in New York the Government gave in evidence certified copy of the indictment and other proof. The accused gave evidence tending to show lack of probable cause. Upon the entire case both the Commissioner and the district judge held there was evidence of probable cause. This Court held that if there was any competent evidence before the Commissioner,

his decision could not be reviewed on habeas corpus and that the court would not in such proceeding in any event look into the weight of the evidence on that question. Greene v. Henkel, 183 U. S. 249, 259-261.

That pioneer case has been followed in many similar efforts to avoid trial. In but one case coming before this Court has the accused succeeded. There the discharge was based on the refusal of the Commissioner to permit accused to give evidence to show lack of probable cause. In all the cases, the accused has accomplished a substantial delay, ranging from six months to several years.

In 1903 fraud and corruption were discovered in the Post Office Department and in the General Land Office in Washington. As a result of prompt and thorough investigation, numerous indictments were returned in the District of Columbia, and some in other Federal courts. Beavers was indicted in Brooklyn, in July, 1903. He was arrested in Manhattan. The Government produced before the Commissioner only a certified copy of the Brooklyn indictment and Beavers offered no evidence. It was held that the Constitution did not require two inquiries and adjudications; and that the certified copy of the Brooklyn indictment made a prima facie case of probable cause. Beavers v. Henkel, 194 U. S. 73.

In 1903 Beavers was also indicted in the District of Columbia. The United States concluded to first try him here. The Government in this proceeding again relied only on the certified copy of the indictment. Beavers made a statement to the Commissioner under New York practice. The Commissioner found probable cause. This Court held that the finding was justified; that the proof afforded by the indictment was

not overcome; that the testimony of the accused when weighed with the indictment did not remove all reasonable grounds of presumption of the commission of the offense. Beavers v. Haubert, 198 U. S. 77, 90. Nearly two years was consumed by Beavers in opposing these removal proceedings.

Green, a co-defendant of Beavers in the District of Columbia indictments, was arrested in the Northern district of New York. The order denying his discharge on habeas corpus was affirmed in a per curiam opinion in October, 1905. Green vs. MacDougall, 199 U. S. 601.

Benson and Hyde were indicted in the District of Columbia in December, 1903. They were charged with conspiring to defraud the United States in connection with obtaining public lands, and there was also a separate charge of bribery against Benson. Benson was arrested in New York and Hyde in California. After vigorous contests they were removed here for trial. The decisions of this Court were in April and May, 1905. Benson v. Henkel, 198 U. S. 1; Hyde v. Shine, 199 U. S. 62.

In addition to reaffirming the propositions decided in earlier cases, it was held that on habeas corpus technical defects in the indictment would not be considered.

Tinsley was indicted in Tennessee under the Sherman Law and was arrested in Virginia. The Commissioner refused to receive evidence offered by him to show lack of probable cause. This was held error by this Court and Tinsley was discharged, without prejudice to a renewal of the application to remove. Tinsley v. Treat, 205 U. S. 20.

Haas and Peckham, residents of New York, were

indicted in the District of Columbia in connection with leaks in the cotton crop reports of 1904 and 1905. No statute specifically forbade the disclosure by Government employees of the information prior to the official publication of the report, though such disclosure was in violation of the rules and practice of the Department of Agriculture. The indictment charged the associate statistician with conspiring with Haas and Peckham to defraud the United States and commit the offense of misconduct in office. The Commissioner and the district judge in New York did not believe that misconduct in office was a crime in the District of Columbia nor that any fraud upon the United States was shown in the indictment; therefore they refused to order the removal of Haas and Peckham for trial. U. S. vs. Haas, 167 Fed. 211.

Thereafter other indictments were found against Haas, Peckham and Price, in the Southern District of New York as well as in the District of Columbia. The two sets of indictments were identical except as to the venue of the conspiracy. Defendants were first arrested on the New York indictments. After demurrers to those indictments had been overruled, removal proceedings were instituted to bring them to the District of Columbia for trial with the Government official who had been indicted here. The Government produced only certified copies of the Washington indictments. The accused called before the Commissioner in New York all the witnesses before the District of Columbia grand jury for the purpose of showing that there was before that grand jury no evidence to justify an indictment; and to show lack of probable cause they produced before the Commissioner the New York indictments alleging the same conspiracy

to have been formed in New York. They attempted to show that the statute of limitations had barred the prosecutions, and argued that the indictments both in substance and in form failed to show any offense against the United States. This Court again held that the technical objections to the indictments could not be considered; that in substance they charged conspiracy to defraud the United States; that the defense of the statute of limitations could not be made in removal proceedings, and that the prima facie case made out by the District of Columbia indictments was not overcome by the New York indictments. Haas v. Henkel, 216 U. S. 462; Price v. Henkel, ib. 488.

In these cases the first indictment was in 1905 and the later indictments in May, 1908. The decision in this court was in February, 1910.

Henry, a New York banker, refused to answer certain questions before a committee of the House of Representatives. In February, 1913, he was indicted in this District under Sections 101 to 104 RSUS. In removal proceedings he asserted that these sections were unconstitutional. This Court in November, 1914, held that question was for the trial court. Henry v. Henkel, 235 U. S. 219.

Rumley was indicted in the District of Columbia for failure to file certain reports with the Alien Property Custodian. On arrest in New York he contended that the indictment on its face showed that if he had filed the reports, he would have shown himself guilty of violating another part of the statute, and that he could not constitutionally be compelled to be a witness against himself. This Court held that the accusatory averments of the indictment, admitted for the purpose of the removal proceedings to be true, made out a prima

facie case of offense against the laws of the United States indictable in the District of Columbia and that appellant's constitutional point merely raised a probability that a defense would be interposed, and thus a controversy would arise, the determination of which was within the proper jurisdiction of the court where the indictment was found. Rumley v. McCarthy, 250 U. S. 283, 288.

As a result of these decisions the following principles have been firmly established:

A Commissioner will be justified in holding, and a District Judge in ordering removed an accused person, if probable cause is found to exist.

Probable cause is established if any competent evidence is produced tending to show the identity of the accused and that an act has been committed within the trial district, which act is a violation of any existing Federal statute.

A certified copy of an indictment in the demanding Federal court is prima facie evidence of the facts alleged therein, and of probable cause.

The accused may give evidence to show lack of probable cause, but if that evidence contradicts the indictment, it is for the Commssioner and the District Judge to decide the conflict, and if they find probable cause, that determination is not reviewable.

Technical rules of pleading are not applied to the indictment; it is enough if in substance it states a violation of the statutes.

Matters of defense will not be considered, whether they relate to the innocence of the accused, the statute of limitations, the sufficiency of the indictment, the constitutional right of the accused not to be a witness against himself, or that the conspiracy be formed and capable of prosecution and indictment therefor be ac-

tually pending in the very district from which the accused is being removed. And even though the prosecution be under an unconstitutional (and therefore a void) statute that question must be decided by the trial court.

Applying these principles, the decision of the district court refusing to issue the writ of habeas corpus was correct.

1. *The amended petition for habeas corpus failed to show sufficient grounds for issuing the writ.*

The petition shows the indictment found in the Western District of Washington against Pothier, charging him with committing murder on land under the exclusive jurisdiction of the United States in that district. The indictment is in the usual form and is valid on its face (1, 5).

The petition also shows formal order of the United States Commissioner finding probable cause to believe that Pothier committed the crime (2, 4).

Under the stipulation, it is presumed that in addition to this order a similar one was issued by the District Judge in accordance with his opinion (Pages 37-40), in which he finds that the defendant has failed to overcome the prima facie case made out by the indictment (40, 146).

While the original petition undertook to produce all the testimony offered before the Commissioner (2), the stipulation and the petition as amended thereby, make no such effort. The stipulation merely is that the petition is to be considered as filed after the issue of a warrant of removal in accordance with the judge's opinion (146).

The petition, itself, merely alleges that the accused

did not commit the crime of murder anywhere and that he did not commit it within the jurisdiction of the district court and that he is prepared to produce evidence to establish these allegations and that the evidence before the Commissioner did not show him guilty of an offense in the Western District of Washington. (Petition, paragraphs 5, 7, 9.)

Pothier does not bring himself within the case of Tinsley v. Treat, 205 U. S. 20. He does not allege that he offered to give evidence and that such evidence was rejected. On the contrary he affirmatively shows that the Washington indictment was before the Commissioner and the District Judge, that Pothier was permitted to give all the evidence he desired and that the Commissioner and District Judge both found there was evidence of probable cause and that Pothier's evidence did not overcome the prima facie case made out by the indictment. This petition, itself, shows that all rights of the accused were fully protected, that he had a complete hearing and that the question was decided against him. It would, therefore, be useless for the court to issue the writ of habeas corpus and hear the question over again. A case for the writ was not made out.

The foregoing proposition is true, even on the assumption that the evidence taken in the removal proceeding is legally before this Court and that such evidence is properly to be considered as amplifying the petition for writ of habeas corpus.

But the evidence on removal proceeding is not properly before this Court. The stipulation does not attempt to attach it to the petition.

On a rule to show cause why a writ of habeas corpus should not issue, the question is purely one of law, to be considered on the contents of the petition alone, and

not on evidence to be introduced. There is no issue of fact until the writ of habeas corpus has been issued and the return has been filed.

Again, a writ of habeas corpus is a common law writ. While under Sections 763 and 764 of the Revised Statutes, review is by appeal, the evidence should be brought up by bill of exceptions as was done in Rice v. Ames, 180 U. S. 371, and Riggins v. U. S., 199 U. S. 547.

2. *A prima facie case was made out by the indictment. The District Judge's decision that this prima facie case was not overcome by the evidence of the accused is conclusive.*

The foregoing cases hold over and over again that the indictment makes a prima facie case of probable cause; that while the accused may give evidence to show lack of probable cause, yet when there is a conflict of testimony, it is for the Commissioner and the District Judge to decide that conflict and their decision will not be reviewed if there is any competent evidence on the subject before them.

Greene v. Henkel, 183 U. S. 259, 261. If there is any competent evidence before the Commissioner, his decision cannot be reviewed; the court will not look into the weight of the evidence on the question of probable cause.

Hyde v. Shine 199 U. S. 63, 84. In this case the production of indictment made at least a prima facie case against the accused and if the Commissioner received evidence on his behalf, it was for him to say whether on the whole testimony there was proof of probable cause.

In Price v. Henkel, 216 U. S. 492, this court said:

> "The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the Commissioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of habeas corpus."

To the same effect is Haas v. Henkel, 216 U. S. 482.

The Court of Appeals entirely overlooks the foregoing decisions. It holds that if the judge's findings are so unsupported by evidence as to be unreasonable and to constitute an abuse of discretion and a denial of due process of law, they may be reviewed (150).

The cases cited deal with findings of immigration officers.

In the present case, the Washington indictment was produced before the Commissioner and the District Judge. That indictment alone is sufficient under the foregoing cases to make probable cause. And the District Judge has found that the prima facie case made out thereby is not overcome. The findings are not unsupported by evidence, they are reasonable, and do not constitute an abuse of discretion. Therefore they may not be reviewed.

The only case cited by the Court of Appeals requiring consideration is Greene v. Henkel. There Mr. Justice Peckham said in substance that the court did not hold that if it appears that the offense was not com-

mitted in or triable in the district to which removal is sought, the court would be justified in ordering removal, but that in such case there would be no jurisdiction to commit nor any to order removal. 183 U. S. 261.

This language was later restated by this Court in Henry v. Henkel, 235 U. S. 230:

> "The cases stated do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial when there was no provision of the common law or statute making an offense of the acts charged. In such case the committing court would have no jurisdiction. The prisoner would be in custody without warrant of law and therefore entitled to his discharge."

In the present case the defense is not one of jurisdiction but one of venue. The statute makes punishable by the United States murder committed on lands within its exclusive jurisdiction. The Government asserts and the District Judge has found that there is sufficient evidence to hold that the land on which this crime was committed is within the exclusive jurisdiction of the United States.

It is admitted that the United States has jurisdiction to punish murder; there is a dispute involving questions of fact and law whether the land upon which the act was done is within the exclusive jurisdiction of the United States. The objection is solely one of venue. It is one which arises in every criminal case in state as well as in Federal courts; it is an element of every crime and often involves a disputed question of fact.

If an indictment on which removal is sought does not charge or attempt to charge that an offense was committed within the territorial limits of the district where

the indictment is found, or if an indictment for murder be charged to have been committed within the Western District of Washington, but does not allege that it was committed upon lands within the exclusive jurisdiction of the United States, then the language of Mr. Justice Peckham would apply and the accused would not be ordered returned. Or if the language of the indictment does not substantially charge a violation of any Federal law, there should be no removal.

But if the indictment charge that an offense was committed within the territorial limits of the district where the indictment was found, and the Commissioner received evidence to the effect that no crime was committed, or that if any crime was committed it occurred in another Federal district, or not on a Government reservation; the finding of the District Judge on that disputed question of fact will not be reviewed, and this even though the evidence be equal on both sides, as in Price v. Henkel, 216 U. S. 490.

So if the offense was committed at or near the border; if the Government rely entirely on the indictment for proof of venue and the accused call witnesses who testify that the act was done beyond the border, it is for the Commissioner and District Judge to decide that conflict. If the offense be charged as committed in a fort within the exclusive jurisdiction of the United States, if the accused attempt to prove a defect in the condemnation proceedings and that complete title did not pass to the United States, the decision of the Commissioner and the District Judge on that question will not be reviewed.

As this Court has held, such questions do not go to the jurisdiction of the trial court but to the jurisdiction of the United States. Louie v. U. S. 254, U. S. 548. This Court has already decided the question presented

in this appeal. In transferring this case to the Court of Appeals, it was said:

> "But it is clear that the objection raised by the petitioner" (Pothier) "does not raise a question of jurisdiction directly appealable to this court from the district court. *Such objection goes to the merits and the appeal must be to the Circuit Court of Appeals.* Louie v. U. S., 254 U. S. 548, 550, 551." (Italics ours.) Pothier v. Rodman, 261 U. S. at 311.

It follows that the objection raised by Pothier being one of guilt or innocence, is to be decided by the trial court.

3. *Important and difficult questions of law should not be decided adversely to the United States by a Commissioner but should be left to the decision of the trial court in regular course.*

In Benson v. Henkel, 198 U. S. 1, 10, this court said:

> "It is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a Federal court of another district and subject to be passed upon by such court on demurrer or otherwise."

In Haas vs. Henkel, *supra*, p. 482, Mr. Justice Brewer, in his concurring opinion, said any doubt as to the validity of the indictments

> "should be settled by the direct action of the court in which the indictments were returned and not in removal proceedings."

He thought there was such a doubt as to the indictments. Mr. Justice McKenna, while concurring in

the removal, expressly reserved his opinion on the merits as to whether the facts constituted a conspiracy to defraud the United States. Ib. 482, 483.

In Henry v. Henkel, 235 U. S. 229, this court reiterated that the hearing on habeas corpus is not in the nature of a writ of error, nor intended as a substitute for the functions of a trial court; this is true as to disputed questions of fact, and equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or to the validity of the statute on which charge is based:

> "*These and all other controverted matters of law and fact are for the determination of the trial court.* * * * *The rule is the same whether he is committed for trial in a court within the district or held under a warrant of removal to another State.* He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction and demanding a ruling thereon in habeas corpus proceedings." (Italics ours.)

On the view most favorable to the accused, the present case does involve an important and controverted matter of law; this question involves the construction of the Constitution, of sections of the Penal Code and of an act of the Washington Legislature, and involves careful examination of a large number of facts, including correspondence and negotiations between the Secretary of War and officials of Pierce County. The question of law is vigorously disputed. In most cases, it would be far easier for the Commissioner to determine the questions of pleading arising upon the indictments and just as easy for him to determine the constitutionality of statutes similar to that involved in the Henry case.

Applying that case, the accused here should not be permitted to anticipate the regular course of proceedings, but should be remitted, as was Henry, to the court in which the indictment is pending.

4. *Even if the district court had the right to discharge Pothier on habeas corpus, it also had discretion to refuse to interfere at this stage. This discretion was wisely exercised and will not be interfered with on appeal.*

It is impossible to imagine a case where a criminal court has in fact less jurisdiction than when it is proceeding under an unconstitutional statute. As this Court said in Ex parte Royall, 117 U. S. 241, 248:

> "As was said in Ex parte Siebold, 100 U. S. 371, 376, 'An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous but is illegal and void and cannot be a legal cause of imprisonment.'"

The statute involved in Ex parte Royall was later held unconstitutional by this Court. Royall while under arrest in criminal proceedings in the state courts of Virginia, sought a writ of habeas corpus from the United States Circuit Court, alleging that the statute was unconstitutional. The writ was denied. On appeal this Court held that while the Circuit Court had power to and might discharge the accused in advance of his trial, if restrained of his liberty in violation of the national Constitution, yet it was not bound to exercise that power immediately upon application being made

for the writ; that the circuit court had a discretion whether it would discharge the accused upon habeas corpus in advance of his trial and that such discretion was not abused in that case (Pages 251, 254).

This principle has been proved in many subsequent cases. Reference to Riggins v. United States, 199 U. S. 547, is sufficient here.

Riggins was indicted in the District Court of the United States for the Northern District of Alabama. The indictment charged a conspiracy under Sections 5508 and 5509, Revised Statutes, to lynch a negro then in the hands of the state authorities on a charge of murder. Riggins, after arrest, applied to the Circuit Court for writ of habeas corpus asserting that the indictment did not charge a violation of any Federal law. The writ was issued but discharged after formal hearing. This Court following the principles announced by it in a number of preceding cases held that it was a judicious and salutary rule not to interfere with criminal proceedings in advance of their final determination by the proper court. And in order to avoid the recognition of the property of Riggins' application which would follow from an affirmance of the action of the court below, this Court reversed the order and remanded the case with directions to quash the writ and dismiss the petition without prejudice.

In the present case the trial court exercised its discretion. It heard and considered the question raised and it decided that no cause was stated in the petition which would justify anticipating the regular course of procedure. The petition shows sufficient evidence of probable cause. The point raised was one of defense within the jurisdiction of the trial court to decide. Following the view of this Court in the Riggins case, the

district court refused even to issue the writ of habeas corpus.

Any hardship suffered by Pothier in this case is less than that suffered by Haas, Peckham and Price, who were actually undergoing prosecution for the identical offense in the district from which they were removed. His hardship is less than that suffered by Beavers and by Rumley, who also were under indictment for similar offenses in the districts of their arrest; or that by Hyde, who could have been prosecuted in California for the same offense, as well as in the District of Columbia.

The language of this Court in Beavers v. Henkel, 194 U. S. 83, is peculiarly appropriate. There the Court said it was less reluctant to interfere in the removal proceedings because the full protecting power of the United States over the accused would continue after his removal to the appropriate place for trial.

5. *At the time of the commission of the murder, the United States did have exclusive jurisdiction over the locus of the crime alleged in the indictment.*

This is so convincingly established in the brief for the Government that it need not be restated here.

CONCLUSION

It is respectfully submitted that there was ample evidence of probable cause before the District Judge, who so found; that the petition for the writ of habeas corpus affirmatively showed the existence of sufficient evidence of probable cause before the District Judge; that the petition for the writ of habeas corpus was properly denied; and that the decision of the Circuit

Court of Appeals must be reversed with directions to affirm that of the District Court.

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